Case No. 04-32315 GFK Chapter 13

In Re:

Charles E. Esch and Mary A. Esch,

Debtors.

#### NOTICE OF HEARING AND MOTION FOR RELIEF FROM STAY

TO: Debtors Charles E. Esch and Mary A. Esch; their attorney Robert J. Hoglund; United States Trustee; and all other entities specified in Local Rule 1204 (a):

- 1. General Motors Acceptance Corporation, ("GMAC"), a secured creditor in this Chapter 13 proceeding, by and through duly authorized and undersigned attorneys, moves the Court for the relief requested below, and gives notice of hearing.
- 2. The Court will hold a hearing on this motion on **November 8, 2004, at 10:30 a.m.,** before the Honorable Gregory F. Kishel, United States Bankruptcy Judge, in Courtroom No. 228b, 200 Federal Building, 316 North Robert Street, St. Paul, MN 55101.
- 3. Any response to this motion must be filed and delivered not later than November 3, 2004, which is three days before the time set for the hearing (excluding Saturdays, Sundays and holidays), or filed and served by mail no later than October 28, 2004, which is seven days before the time set for the hearing (excluding Saturdays, Sundays and holidays).

UNLESS A RESPONSE OPPOSING THIS MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.

- 4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, Bankruptcy Rule 5005, and Local Rule 1070-1. This is a core proceeding. The petition commencing this Chapter 13 case was filed on April 16, 2004. The case is now pending in this Court.
- 5. This motion arises under 11 U.S.C. § 362 and Bankruptcy Rule 4001. This motion is filed under Fed. R. Bankr. P. 9014 and Local Rules 5005-4, 9006-1, 9013-1 and 9017-1. GMAC requests relief from the automatic stay under § 362 of the Bankruptcy Code to foreclose its security interest in certain personal property of the debtors as defined below.
- 6. On April 16, 2003, the debtors, Charles Esch and Mary Esch, executed a promissory note and security agreement in favor of GMAC, in the original principal amount of \$14,467.50, plus interest thereon at the stated rate, payable according to the terms and conditions therein, a copy of which is attached hereto as **Exhibit "A"**. Security for the promissory note consists of a security interest in a motor vehicle, a 2003 Chevrolet Cavalier, VIN # 1G1JC52F037200262. Proof of perfection of the security interest of GMAC is attached hereto as **Exhibit "B"**.
- 7. The promissory note is in default for failure to make payments when due since August 2004, a delinquency in the approximate amount of \$638.28. As of April 16, 2004, the amount due was a payoff balance of approximately \$11,649.71. On information and belief, the value of the vehicle is \$8,725.00 and the debtors have no equity in the vehicle.

- 8. The loan is in default for failure to make payments when due. GMAC seeks relief from the automatic stay to foreclose its personal property security interest in the vehicle.
- 9. Pursuant to 11 U.S.C. § 362(d)(1), a creditor may be granted relief from the automatic stay for cause, including lack of adequate protection. GMAC believes that cause exists to grant it relief from the automatic stay to foreclose its personal property security interest, for the following reasons:
- a. GMAC has not been offered and is not being provided with adequate protection for its interest in the vehicle;
- b. The vehicle subject to the security interest of GMAC continues to depreciate and decline in value; and the debtors have stopped making payments to GMAC.
- 10. Pursuant to 11 U.S.C. § 362(d)(2), a creditor may be granted relief from the automatic stay, if there is no equity in the property which is the subject of the motion, and property is not necessary for an effective reorganization. Here, the debtors have no equity in the vehicle that is the subject of this motion, and the vehicle is not necessary for an effective reorganization in this Chapter 13 proceeding.

11. If any testimony is necessary on any of the facts relative to this motion, testimony

will be given by J. Wood, or some other representative of the Movant, General Motors

Acceptance Corporation.

WHEREFORE, GMAC requests entry of an Order granting the relief from the automatic

stay of 11 U.S.C. § 362, to allow it to foreclose its personal property security interest described

above, and for such other and further relief as the court deems just and equitable under the

circumstances.

Dated: October 20, 2004

RIEZMAN BERGER, P.C.

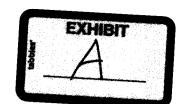
/e/ Marilyn J. Washburn

Marilyn J. Washburn, #0324140 7700 Bonhomme Ave., 7th Floor St. Louis, MO 63105 (314) 727-0101

FAX (314) 727-1086

Attorneys for GMAC

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CTHER IMPORTANT AGRIMMENTS in the second of the second sec

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Security Interest. You give the Credier a security interest in (1) the vehicle being purphased, (2) any screekedes, equiphent and replacement participation in the vehicle, (3) any leasurance premises and designs for service insulated in the vehicle, (3) any leasurance participation and other processes of insulance palicies or sorvice destinate on the vehicle, (4) only proceeds of insulance palicies on your life or health that are Sanaccide high contract. This scauses payment of all amounts you even in the contract and in any transfer, introval, escondary or a single-ment of this contract. It also secures your offers approximate in this contract.

Propagnish t. You may propay this bilippid balance of the Amount Propagation in just at any limb without penalty. If you do so, you must pay the yound and unput pays at a the Trianna Charge and all other anti-units due up to the date of payment.

Frequired Physical Damage Insurance. You agree to have physical damage insurance covering that of standard to the vehicle for the learn of the contract. At any time during the harm of the contract, if you do not have physical demange insurance valid rowers both the interest of you and the Creditor in the vehicle, thou the Creditor may bely a ker you. If the Graditor count of the contract of you physical damage insurance which covers belt interests in the probable, it may, if it decides, buy insurance which covers only the Creditor's invariance.

The Chaditar is under no abligation to buy any insurance, but may do so if it dealers. If the Oreginer buys either of fears obviorages, it will let you know what type it is end the charge you must pay. The sharple will be in a prumble for the spurmon and a finance charge at the Annual Perpendage rule shown or the fears of the dealers. You signed to pay the charge in equal installments along with the payments of the payment activation with the payments activation.

If the vehicle is lost or demaged, you agree that the Creditor can use any insurance estilement either to repair the vehicle or to apply to your color.

Optional Insurance or Service Continuets. The contract may contain charges for optional insurance or service contracts. If the vehicle is reposseded, you agree that the Creditor may older healty under these contracts and immunist them to obtain refunds for unsultaned charges.

Insurings or Service Contract Charges Februard to Creditor, if any obego for required fearments is returned to the Creditor, it may be credited to your amount of used to buy effects insurance or household which covered only the Creditor's interest to the varieties. After printed on expension constructs believed by the Creditor will be oreafted to your account. You will be notified of what is done.

You will be notified of what is done.

Required Repayment in Pruit Before the Enhancied Tinin. If you fell to pay my payment when their is a preceding in bankinghoy, recovering or my only payment when their is not property or it was presented in this contract the facility. The Creditor can demand stell you pay all you one on this contract the ones (not just past due payments). The amount you never will be the unput balance of the Ambanishment of the Ambanishment

Repeasement of the Vehicle for Fallure to Fay, Repeasement sharps that, if you hall to pay according to the payment schedule of if you break any of the appearance in the expression of the common formation of the payment of the payment of the vehicle the Creditor can ever your property of these is saying property where it is shown to come of the parameter of the payment of the payment of the payment of the cellular and some first the payment of the payment of the payment of replacement plants will remain with the vehicle.

Glething the Vehicle Manic After Representation. If the Crudion represents the vehicle, you have the right to get it back (redeem) for paying the selve amount you cove on the contract type just paid due payments. The microst you cove of the contract type part of the Finance Charge, and so other seconds but the cerned and trippid part of the Finance Charge, and so other seconds but the regulation to coal of taking and sating the vehicle and other originaries that he delier of the Crudion has true. You must also que any defect in addition in nondepress of what you over. Your right to redeem will see swear the vehicle to be cold.

Eals of the Represented Vahiets. The Creditor will send you a written routes of aste at least 10 days before eating the vehicle. If you do not redeem the vehicle by the date on the notes, and Creditor and ill. The Creditor will use the red proceeds of the bale to pay all or port of your debt.

The net proceeds of sale will be liquied this way: Any charges for saling and Maring the vehicle, clearing and advantaing sto., and any stiomey toos and court costs will be subtracted from the setting price.

If you owe the Creditor less that the not proceeds of sele, the Creditor will pay you the difference, unless mouled in any it is semected elem. For the organizer may be required to set a larger who has alven you a less and do taken a security interest in the vehicle.

If you owe more than the net preparate of sale, you sall pay the Creditor the difference between the net prepared of sale and what you owe when the Creditor sales for it. If you do not pay this amount when salesd, you may sales be changed interest at the highest month sale until you do pay all you over to the Creditor.

Collection Gasia. If the Creditor Have on allocary to collect what you own, you will pay the allocary's reallocable les End any sourt costs. The allocary's too will not exceed 16% of the amount that you own.

Daley to Enferoing Flights and Changes of this Cookney. The Creditor can delay or retrain from enforcing any of its rights under this contract whose home personal subtout extensive contract contract contract persons payments without extending others. Any change in terms of this contract must be in writing and signed by the Creditor. No real changes must be fully it any said of this contract is not valid, all other parts will remain enforceable.

Wateraches Goter Dissibilità. You understand that his fatter he not offering day unermailée and fine there are no implied warriches of merchantability, of fitness for a particular perposa, or any other unermailes; express or implied by the Beller, covering the vehicle number of Spaler automote a uniform warrantly or carried in vehicle than the days from the date of this covered.

The loregoing dischainner of implied warranties done not apply if this contract corters a new vehicle that was obtained printerly for personal near unless you ware informed in writing prior to signing this confused that the vehicle was each or as "as in "o" "with all insules" begin and that you have no exist a second that you have the entire risk so to the quality end performance of the maketing.

An implied warranty of merchaniability generally meens limit the vehicle is R. for the ordinary surpose for which must vehicles are generally used. A warranty of Smeet for a particular purpose in a warranty that they sales when the Balter has reason to induct the particular purpose for which you require the vehicle and you rety on the Solder's still or judgment by sumbirs a sufficient

This provision does not alread any warrantee covering the vehicle be provided by the vehicle manufactures.

Used Car Suyers Quide. The information year see on the window form for this which is pert of like contract, information on the windows form overrides any centerty provisions in the contract of sale.

everygan any contrary provisions in the centrast of sale.

Notice of Substitution of Columns, it isolar obstinated his vehicle from
General Motors Corporation (third, on instrument steed terms, this contract
will be substituted by Saler for and replaced the Saler's obligation to pay GM
will be substituted by Saler for and replaced the Saler's obligation to pay GM
for the vehicle you are purchasting. This substitution will not not perform
for execute you have speed to pay the Saler, the payment schedule, the
finance charge or any of your rights and duties for this purchase. The terms
of this contract set lority sour exists and only obligation to Saler. GM, or ony
other holder of this contract.

NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DESTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS MEREOF, RECOVERY HEREUNDER BY THE DESTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DESTOR HEREUNDER.

The preceding NOTICE applies only to goods or services obtained primarily for personal, family, or household use. In all other cases, Buyer will not assert against any subsequent holder or assignes of this contract any claims or defenses the Buyer (debtor) may have against the Seller, or against the manufacturer of the vehicle or equipment obtained under this contract.

And the second s

MINNESOTA DEPARTMENT OF PUBLIC SAFETY DRIVER & VEHICLE SERVICES DIVISION 445 MINNESOTA ST., ST. PAUL, MN 55 10? CONFIRMATION OF LEN PERFECTION - DEBTOR NAME AND ADDRESS

2741 GRESHAM AVE N **OAKDALE NN 55128** ESCH MARY ANN

161JC52F037200262 04/16/03 RETAIN THIS DOCUMENT - See reverse side of this form for removing this lien. 4DCAC CHEV

Vaar

1ST SECUR

JWX871

LEN GMAC

COCKEYSVILLE MD PO BOX 8122

In re:

Chapter 13

Mary A. Esch & Charles E. Esch,

Bky. No. 04-32315-GFK

Debtor(s).

Affidavit of J. Wood

- I, J. Wood, of General Motors Acceptance Corporation, declare under penalty of perjury that the following is true and correct to the best of my knowledge, information and belief:
- 1. General Motors Acceptance Corporation has a security interest in the following (the "Collateral"):

N03 CHEVCAVALIER VIN/HIN: 1G1JC52F037200262.

- 2. \$\frac{\$11,649.71}{}\$ is the outstanding balance under the contract as of October 18, 2004.
- 3. \$638.28 is the amount of the existing delinquency under the contract.
- 4. \$8,725.00 is the fair market value of the Collateral.
- 5. Yes Appropriate insurance has been verified.
- 6. 638.28 is the payment default under the Chapter 13 Plan.

Further your affiant sayeth not.

Dated:

10/18/2004

Bankruptcy Specialist

General Motors Acceptance Corporation

18, 2004

Notary

NICOLE ANN GROTHE ROTARY PUBLIC-MINNESOTA My Commission Expires Jan 31, 2009

Subscribed and sworn to before me on October

Case No. 04-32315 GFK Chapter 13

In Re:

Charles E. Esch and Mary A. Esch,

Debtors.

#### **MEMORANDUM OF LAW**

### **INTRODUCTION**

General Motors Acceptance Corporation ("GMAC") has made a motion for relief from the automatic stay. GMAC incorporates herein the facts set forth in the notice of hearing and motion for relief from stay.

There is one loan that is the subject of this motion secured by a security interest in a motor vehicle. The loan is in default for failure to make payments when due. GMAC seeks relief from the automatic stay to foreclose its personal property security interest. There is no equity in the vehicle.

### **ARGUMENT**

Pursuant to 11 U.S.C. § 362(d)(1), a secured creditor may be granted relief from the automatic stay, including lack of adequate protection. The motion, filed by GMAC, for relief from the automatic stay demonstrates cause for relief from the stay for all reasons set forth in the motion. In the aggregate, these circumstances demonstrate cause for relief from the automatic stay. <u>United Savings Assn. of Texas v. Timbers of Innwood Forest Assoc. Ltd. (In re</u>

<u>Timbers of Innwood Assoc. Ltd.)</u>, 484 U.S. 365 (1988).

Also, there is little or no equity in the vehicle that is the subject of this motion and the vehicle is not necessary for an effective reorganization, which allows the stay to be lifted pursuant to 11 U.S.C. §362(d)(2). **In re Anderson**, 913 F.2d 530, 532 (8th Cir. 1990).

### **CONCLUSION**

Based on the foregoing, GMAC requests that the Court issue an Order lifting and terminating the automatic stay provided by 11 U.S.C. §362(a) to permit GMAC to enforce and foreclose its personal property security interest.

DATED: October 20, 2004

RIEZMAN BERGER, P.C.

/e/ Marilyn J. Washburn

Marilyn J. Washburn, #0324140 7700 Bonhomme Ave., 7th Floor St. Louis, MO 63105 (314) 727-0101 FAX (314) 727-1086 Attorneys for GMAC

Case No. 04-32315 GFK Chapter 13

Charles E. Esch and Mary A. Esch,

In Re:

Debtors.

#### UNSWORN DECLARATION FOR PROOF OF SERVICE

Marilyn J. Washburn, an attorney licensed to practice law in this court, and employed by Riezman Berger, P.C., with an office address of 7700 Bonhomme Avenue, 7<sup>th</sup> Floor, St. Louis, Missouri 63105, declares that, on the date listed below, I served a **Notice of Hearing for Relief from Stay, Memorandum of Law** and **Proposed Order** upon each of the entities named below by mailing to each of them a copy thereof by enclosing same in an envelope with first class postage prepaid and depositing same in the post office at St. Louis, Missouri, addressed to each of them as follows:

(Debtor) Charles E. Esch 2741 Gresham Ave. North Oakdale, MN 55128

(Debtor) Mary A. Esch 2741 Gresham Ave. North Oakdale, MN 55128

(Debtor's Attorney) Robert J. Hoglund P.O. Box 130938 Roseville, MN 55113 (Chapter 13 Trustee) Jasmine Z. Keller 12 South 6th Street, Suite 310 Minneapolis, MN 55402

Office of the U.S. Trustee 1015 U.S. Courthouse 300 South 4th Street Minneapolis, MN 55415

And I declare, under penalty of perjury, that the foregoing is true and correct.

Executed: October 20, 2004

Signed: /e/Marilyn J. Washburn

In Re:		Case No. 04	4-32315 GFK Chapter 13		
Charles E. Es Mary A. Esch					
111 <b>0</b> 25 111 2501	Debtors.				
	OR	DER			
The al	bove entitled matter before the Cou	urt for hearing on	, 2004, on		
the motion of	General Motors Acceptance Corp	oration, ("GMAC"), seeking relief f	rom the		
automatic sta	y of 11 U.S.C. § 362(a). Appearar	nces are as noted in the Court's recor	rd.		
Based	on the proceedings had on said da	te, the statement of counsel and all t	the files and		
records herei	n, the Court now find that cause ex	ists entitling GMAC to relief from t	he automatic		
stay.					
NOW	, THEREFORE, <b>IT IS HEREBY</b>	ORDERED that:			
1.	The automatic stay is immediately	y terminated as to GMAC and GMA	AC is		
authorized to	proceed with its legal remedies acc	cording to state law as to the subject	t motor		
vehicle,					
	a 2003 Chevrolet Cavalier, VIN	# 1G1JC52F037200262.			
2.	Notwithstanding Fed. R. Bankr. P. 4001(a)(3), this Order is effective				
immediately.					
DATI	ED at St. Paul, Minnesota, this	day of, 2004.			
		BY THE COURT:			
		Gregory F. Kishel United States Bankruptcy Judg	ge		